



April 3, 2002

Mr. Craig H. Smith
Deputy General Counsel
Texas Workers' Compensation Commission
4000 South IH-35, MS-4D
Austin, Texas 78704-7491

OR2002-1638

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160877.

The Texas Workers' Compensation Commission (the "commission") received a request for all communications between two specified individuals. You claim that the requested information is excepted from disclosure under section 552.107 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

As a preliminary matter, you indicate that some of the submitted documents may not be responsive because they are not communications directly between the two individuals named in the request. The two named individuals are, however, parties to the communications in question. We note that the commission is permitted to ask the requestor to clarify the request as provided in section 552.222 of the Government Code. Since the commission submitted these documents in connection with your request for a ruling from this office, we assume that the commission considers the submitted documents to be responsive to the request.

Next, we address the commission's obligations under section 552.301 of the Government Code. Subsections 552.301(a) and (b) provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney

general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

You acknowledge that the commission has not complied with the ten business day deadline to request a decision from this office. The commission received the request for information on January 10, 2002. You did not request a decision from this office until January 29, 2002. Because the request for a decision was not timely received, the requested information is presumed to be public information. Gov't Code § 552.302.¹

In order to overcome the presumption that the requested information is public information, a governmental body must provide compelling reasons why the information should not be disclosed. *Id.*; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.--Austin 1990, no writ); see Open Records Decision No. 630 (1994). A compelling reason is demonstrated where information is made confidential by other law. Open Records Decision No. 150 (1977). You raise section 552.107(1) of the Government Code and contend that the requested documents are covered by the attorney-client and the work product privileges.

Section 552.101 does not encompass discovery privileges like the attorney-client privilege or the attorney work product privilege. Open Records Decision Nos. 574, 575 (1990). Information subject to section 552.022 of the Government Code may be deemed confidential if found to be subject to a discovery privilege. See *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). However, the information at issue relates to internal communications and is not subject to section 552.022 of the Government Code. As this information is not subject to section 552.022, we need not consider whether the information is confidential under a discovery privilege for purposes of section 552.022(a). See *id.*

Your claimed exception incorporates the attorney-client privilege. The attorney-client privilege, as incorporated into section 552.107(1), belongs to and serves the interests of the governmental body as client, and may therefore be waived by the governmental body. Open Records Decision No. 630 (1994). The governmental body may implicitly waive the privilege by conduct, including taking or failing to take certain actions or failing to act within a proper time frame. This office has determined that the mere fact that information falls within the section 552.107 exception does not alone constitute a compelling reason sufficient

¹This office has determined in another ruling to the commission that the ten business day deadline under section 552.301 is not tolled when a governmental body requests a deposit for costs owed from a previous request. Open Records Letter No. 2002-1516 at 2-3 (March 27, 2002).

to overcome the presumption of openness that arises when a governmental body fails to request an attorney general decision within ten days of receiving an open records request. Open Records Decision No. 630 (1994). Accordingly, we conclude that the commission must release the information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read 'DRS', followed by a long horizontal flourish.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/sdk

Ref: ID# 160877

Enc: Submitted documents

c: Ms. Leonor Matano
580 Irene Drive
Canyon Lake, Texas 78713
(w/o enclosures)